



February 21, 2017

Glenn Meeks
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

RE: Draft Salt and Nutrient Management Plan – EJ Stakeholders’ Comments

Dear Mr. Meeks,

The above listed organizations (the “EJ Stakeholders”) write in response to the release of the final draft of the Salt and Nutrient Management Plan (“SNMP” or “draft SNMP”) both on their own behalves and on behalf of the communities impacted by nitrates and vulnerable to nitrate related impacts throughout the San Joaquin Valley including but not limited communities represented by the AGUA coalition, Tombstone territory, and Tooleville.

The EJ Stakeholders have participated in the Central Valley Salinity Coalition’s (the “Coalition”) process for developing this Draft SNMP for most of its 10 years, serving as the lone environmental justice participants. Our goal in participating is and has always been to ensure that the impact of nitrates on communities is reduced and that nitrate contamination does not spread to more communities. While we support the three central management goals of the CV-SALTS process for nitrates: (1) addressing short & long-term drinking water needs for communities impacted by nitrates; (2) achieving nitrate loading balance within groundwater basins; and (3) restoring the basin, the policies espoused in these documents fail to achieve these goals with any certainty or within any meaningful timeframe.

In fact, the studies and analyses that support the draft SNMP show that degradation of the basins will continue for decades, if not centuries, to come if the SNMP is adopted and implemented. We have expressed our concerns about the inadequacy of the SNMP repeatedly to the Coalition, in the form of comment letters,¹ redlines of the policy documents, and verbal comments at monthly Coalition meetings. Despite our long-standing participation and efforts to work with the Coalition members to ensure that the final SNMP, and any related basin plan amendment, will be protective of groundwater quality, the majority of our comments and

¹ The most recent comment letter, as well as red-lines of the policy documents are attached to this comment letter. They remain relevant given that little substantive change has been made from prior drafts of the SNMP and supporting documents.

edits to the documents have been included as nominal alternatives and relegated to an appendix to the Final Draft SNMP. Neither the environmental nor economic analyses consider the alternatives put forward by our organizations.

The result is an SNMP that includes few, if any, enforceable timelines, targets, or standards — apparently demonstrating a lack of commitment to any difficult or costly policies that would minimize nitrate related degradation to groundwater, or require remediation and restoration. Moreover, the Substitute Environmental Document (“SED”), Antidegradation Analysis, and Economic Analysis submitted in support of the SNMP are wholly inadequate, inconsistent, and incomplete. (See Technical Comment Letter concurrently submitted by the EJ Participants.) Below is a brief summary of some of the major issues with the draft SNMP and supporting documents.

I. THE SNMP ALLOWS CONTINUED DEGRADATION AND EVENTUAL DE-DESIGNATION OF AFFECTED GROUNDWATER BASINS.

1. Reliance on assimilative capacity will exacerbate groundwater degradation and pollution and increase vulnerability of residents and communities to nitrate contamination.

a. Assimilative capacity must not be based on the maximum contaminant level (“MCL”).

The SNMP recommends that assimilative capacity be allocated up to the MCL of 10 mg/L, with some additional information and data required if discharges exceed 7.5 mg/L. While we appreciate that the SNMP requires an Alternative Compliance Plan (ACP) for discharges over 7.5 mg/L, it is unclear how protective these ACPs will be when management goals 2 and 3 (nitrate balancing and restoration) are only required where “reasonable and feasible”. There needs to be more protective measures put in place, rather than allow discharges up to the MCL. This allows no room for error, accidental discharges, discharges of parties not included in the cumulative analysis, or mistaken calculations or assumptions as to how much assimilative capacity exists. Any plan or regulatory framework designed to prevent groundwater from exceeding the MCL must include a buffer. A water system is deemed out of compliance after just one exceedance, even if with the next testing the system is back under the standard. Yet, despite the additional treatment and testing costs that will be borne by public water systems, and consequently individual water users, the SNMP does not address these rising costs and actually contributes to ongoing contamination of water supplies. Additionally, many communities within the Central Valley rely upon state small water systems or private wells, which have no testing requirements. These communities are the most vulnerable to MCL exceedances, and any regulatory program which proposes to regulate an acute contaminate like nitrates must be hyper-aware of the potential impact an error might have.

We have proposed that assimilative capacity should be capped at 7.5 mg/L and any additional discharges must obtain an exception. A 7.5 mg/L standard is consistent with the Drinking Water regulatory program’s existing policy.

b. Determination of assimilative capacity across a management zone is not appropriate.

The SNMP proposes to allow dischargers participating in a management zone to determine assimilative capacity averaged across the entire management zone. To put into perspective, a management zone may be as large as an entire basin. This will obscure areas of contamination - or hot spots - within a management zone. In fact, as acknowledged in the SNMP and related SED, averaging across a broad stretch of land that is not close to the discharge is likely to result in localized impacts. As the EKI report states, studies have shown that there is relatively little mixing of groundwater, even when in close geographic proximity.

Assimilative capacity must not be granted across a management zone. Assimilative capacity should be determined in a much more narrow geographical scope. Potential alternatives could include, but should not be limited to: determining assimilative capacity by looking at a mile and a half radius from impacted wells (consistent with the UCD Nitrate Report), or granting assimilative capacity only in an area of the discharge with established hydrologic connections that indicate mixing will occur within the period of the permit or 10 years, whichever is shorter. These alternatives, and any others, would of course need to be analyzed within the requisite CEQA documents to ensure they would not result in degradation of groundwater.

c. The production zone is never an acceptable means of vertical measurement of assimilative capacity.

While the EJ stakeholders appreciate the move away from determining assimilative capacity across the production zone for nitrate discharges to the use of “shallow groundwater”, we are still concerned that this is an insufficient change. Further, we are concerned with the use of the “upper zone” for dischargers participating in a management zone. For dischargers complying with WDRs individually, the standard proposed by the SNMP is to determine assimilative capacity in “shallow groundwater” which is defined as the upper 10% of the upper zone. However, dischargers participating in a management zone are allowed to determine assimilative capacity across the entire upper zone. It is not clear from the SNMP how the actual depth of the upper zone is determined, and the EJ stakeholders are concerned that in practice the upper zone will look more like the production zone (upper and lower zones) than shallow groundwater. The production zone is never an acceptable means of vertical measurement of assimilative capacity. Averaging across the production zone leans towards the deeper aquifer, beyond the depth of many domestic private wells. This leaves communities dependent upon shallow wells vulnerable to exceedances of drinking water standards.

d. Offsets threaten to create and exacerbate hot spots and facilitate greater degradation of the aquifer.

As defined and used within the SNMP, “offsets” have the potential to result in degradation and contamination hot spots. Offsets should not be used as a mitigation for contamination but rather as a mechanism to, literally, offset a discharge in a given area. In circumstances where a discharge will exceed water quality objectives without a corresponding offset to eliminate or adequately reduce the discharge, the exception policy applies.

Accordingly, the offsets policy needs to be limited only to use as a means of compliance with water quality objectives such that the discharger can demonstrate no degradation and no localized impacts as a result of the discharge in combination with the “offset”.

e. Exceptions granted for indefinite periods of time are inconsistent with the management goals of the SNMP.

The SNMP recommends that exceptions should be granted for 10 years, though longer exceptions may be granted. However, exceptions granted for longer periods of time are not consistent with the management goals. Indefinite exceptions will prevent the achievement of nitrate balancing and long-term restoration of the basin. Exceptions should thus not be granted for more than 10 years at a time, though the Board may grant an extension so long as additional requirements are met, including meeting measurable objectives and targets. New data and technology are frequently discovered and thus may make the need for an exemption null as the discharger may be able to effectively reduce their nitrate loading.

2. Failure to require a plan for long-term restoration will result in continued degradation of the basins.

The draft SNMP does not contain a timeline for restoring the basin, or even a timeline for drafting a plan for restoration. In fact, even the basic first step towards restoration, achieving a salt and nutrient balance, is not a firm requirement. This is at odds with the goals of the SNMP and must not be permitted. The SNMP must contain a timeline for 1) achieving a salt and nutrient balance and 2) creating a plan including measurable objectives and targets toward restoration. The Plan must also be reviewed on a regular basis, at least every 10 years, to ensure targets are being met and to incorporate new data or technology.

3. Allowing dischargers to determine whether nitrate balancing or long-term restoration is “reasonable and feasible” will result in de-facto de-designation of the basins.

Despite the fact that balancing nitrate loading and long-term restoration of the basin are stated goals of the SNMP, they are only “required” when it is “reasonable and feasible” to do so. This is unacceptable. Furthermore, the SNMP provides no guidelines on what the phrase “reasonable and feasible” means. Allowing dischargers to side-step the process by determining a recommended action is not “reasonable and feasible” will result in de facto de-designation of basins.

Section 2.2 of the Management Zone Policy is titled “Minimum Requirements for Management Zone Implementation Plan.” However, the section still qualifies that a plan for balanced nitrate loading and long-term restoration are only necessary where “reasonable and feasible.” This is not a “requirement” but a suggestion. Without clarification of what “reasonable and feasible” means, it is an easy suggestion for management zone participants to ignore.

II. THE SED, ANTIDEGRADATION ANALYSIS, AND ECONOMIC ANALYSIS ARE INADEQUATE.

As noted above, the EJ Stakeholders have concurrently submitted a letter describing in detail the flaws in these three (3) technical documents (the “Technical Comment Letter”). Attached to that letter is a report prepared by Erler & Kalinowski, Inc (EKI Report). which supports the conclusions and opinions of the EJ Stakeholders. For the convenience of the Regional Board, the comments detailed in the comment letter on the technical documents are summarized in part here.

1. The Supplemental Environmental Document is Inadequate.

As an initial matter, the SED analyzes only two (2) alternatives, the “Proposed Project” and a “No Project” alternative. An SED that analyzes only two alternatives is facially invalid under CEQA because it does not discuss a “reasonable range” of alternatives. Though the SNMP in Attachment D lists several proposed project alternatives, including many of the EJ Stakeholders’ proposed alternatives, the SED does not analyze these options. Furthermore, the analysis of the “No Project” alternative is insufficient in its own right, as the discussion is speculative and lacks factual bases regarding the projected nitrate degradation under presently operative regulations.

The SED also does not contain any analysis of enforceable feasible mitigation to address the significant impacts that the policies in the draft SNMP will cause. While the SED does briefly mention in connection with the “exceptions” policy that exceptions will not be authorized unless “dischargers assure an adequate supply” of drinking water adversely affected by the non-compliant discharge, this is not an adequate mitigation measure. The requirement does not apply to the other discrete policy proposals or cumulative impacts, and does not address environmental impacts to the basin itself. Further, there are no proposed enforcement measures or monitoring programs to ensure that replacement drinking water is actually provided.

Additionally, the impact findings in the SED are not supported by substantial evidence, and the SED thus fails as an informational document. In the Technical Comment Letter, the inadequacies of the findings are discussed with respect to each impact category. Those inadequacies are exemplified by the inconsistency between the proposition that long term impacts will be “less than significant” though the policies contained in the SNMP will cause, at a minimum, localized impacts some of which will not be restorable in “reasonable and feasible” manner. (See SED p. 137 [“the Proposed Project would allow localized areas of groundwater basins/subbasins that are near or over the applicable water quality objective to be further degraded in the future, and because it will not be feasible to remediate all such localized areas of groundwater back to existing conditions or conditions better than existing conditions, ... the Proposed Project would contribute considerably to adverse cumulative conditions of nitrate in some localized areas of basins/subbasins within the Central Valley.”].)

Moreover, even if the SED were consistent with substantive CEQA requirements, the Regional Board still could not rely on the SED in adopting the SNMP because the Board cannot delegate its duty to exercise “independent judgment” in an “adequate” and “objective” manner to the central Valley Salinity Coalition. (See Cal. Code Regs., tit. 14, § 15084(e).)

For these reasons, the SED does not comply with applicable CEQA requirements.

2. The Economic Analysis Is Inaccurate.

The Economic Analysis contains a number of unbacked assumptions which impact the adequacy of the SED and Antidegradation Analysis, including but not limited to:

- a. The Economic Analysis excludes communities larger than 5,000 residents, citing an assumption these communities have water systems and thus would not “be candidates for user protection under the Central Valley SNMP.” (Economic Analysis p. 98). There is no evidence all communities over 5,000 have water systems nor is there any evidence that communities larger than 5,000 residents are not or will not be impacted by nitrate exceedances. Further, the Economic Analysis does not provide evidence that water systems for communities over 5,000, and which may be impacted by nitrates, are able to provide affordable water to their customers.
- b. The Economic Analysis utilizes 2010 census numbers rather than more accurate population projections. Similarly, it does not consider the dynamic costs associated with providing bottled water as more residents are impacted by increased nitrate levels, while at the same time, more residents receive clean drinking water through permanent solutions.
- c. The economic analysis assumes that drinking water needs are only 2.25 gallons per day per household. 2.25 gallons represents the bare minimum necessary for drinking water and does not include other consumptive uses such as brushing teeth, washing produce, or cooking. A per household estimate is closer to 10-20 gallons per day. (EKI Report, p. 9). Furthermore, the 2.25 gallon number assumes a temperate climate, not the 90+ degree Central Valley summers. Thus the economic analysis significantly underestimates the cost of replacement water. Couple this with the lack of analysis on future impacted populations due to the slow move of nitrate to the basins, and there is a serious need for further analysis.

3. The Antidegradation Analysis Is Inconsistent And Inadequate.

First, the Antidegradation Analysis states the wrong legal standard, relying on an unsigned proposed order for the proposition that *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1256 is inapplicable. Under the proper legal standard, the discussion contained in the Analysis does not comply with the State or Federal Antidegradation Policy.

Second, the Antidegradation Analysis relies on two (2) proposed “qualitative” categories that it assumes without support comply with the Antidegradation Policy: (a) “A policy element will allow short-term change in high quality waters while actions are taken that improve beneficial use protection and provide long-term water quality improvement or other benefits”; and (b) “A policy element will allow a short term (sic) change of in (sic) high quality waters in a localized area while creating water quality improvements or other benefits in a larger area.” (Antidegradation Analysis p. 81-82.) As for the first category, permitting degradation – even short-term degradation – may not be consistent with the maximum benefit to the people of the State, especially given that “short-term” is defined to mean years or decades. The second “category” is similarly inconsistent with the State

Antidegradation Policy, which looks to site-specific impacts on people. Depending on the location of the “localized area” of degradation, it may have significant impact on people outweighing any benefit to those living in a larger area.

Third, the Analysis uses an improper baseline for comparing water quality, utilizing “current water quality conditions” rather than “the best water quality that has existed since 1968.” (See Antidegradation Analysis p. 81.)

Fourth, though the Antidegradation Analysis discusses degradation caused by the discrete SNMP policies, it does not consider the significant cumulative impacts acknowledged in the SED.

Additionally, though the Antidegradation Analysis tacitly acknowledges that some “short-term” degradation will result from the SNMP policies, it is inconsistent with the SED which acknowledges “years” or “decades” of substantial impairment to groundwater due to nitrate contamination, some of which will persist permanently. (See SED p. 137.) As the Antidegradation Analysis thus impermissibly minimizes the degradation likely to result from implementation and adoption of the draft SNMP, it does not comply with the State or Federal Antidegradation Policy.

Finally, when applying the proper “two-step process” required by the State Antidegradation Policy, the Analysis does not affirmatively “demonstrate” that the degradation permitted by the SNMP is “consistent with the maximum benefit to the people of the State” or that adoption of the SNMP will result in “best practicable treatment or control of the discharge necessary to avoid pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State.” (See Technical Comment Letter pp. 26-32.) “Short-term” degradation of groundwater spanning “years” or “decades,” some of which will never be restored is not consistent with the maximum benefit to the people of the State, especially given that this groundwater is used by 95% of San Joaquin Valley residents for drinking water. (Carolina Balazs et al., Social Disparities in Nitrate-Contaminated Drinking Water in California’s San Joaquin Valley (Environmental Health Perspective 2011), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3230390/>.)

Sincerely,



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